

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Petitioner,

New York, N.Y.

v.

10-2095-cr

JOHN DOE.

Respondent.

February 14, 2011
1:30 p.m.

Before:

HON. JOSE A. CABRANES, Presiding
HON. ROSEMARY S. POOLER
HON. DENNY CHIN

Circuit Judges

APPEARANCES

TODD KAMINSKY
PETER A. NORLING
MARSHALL MILLER
ELIZABETH KRAMER
Attorneys for Petitioner

RICHARD E. LERNER
Attorney for Respondent

KELLY ANN MOORE
Attorney for John Doe

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Attorney for Respondent

KELLY ANN MOORE
Attorney for John Doe

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APPEARANCES (Continued)

3

ALSO PRESENT:

4

RICHARD ROE

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JUDY SELMECI

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DAVID SNYDER

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NADER MOBARGHA

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MICHAEL BEYS

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1 JUDGE CABRANES: Good afternoon. This is United
2 States of America v. John Doe. It has many captions. I will
3 call the role of roll of counsel and the parties in two appeals
4 that have been consolidated for purposes of argument and that
5 at least for now bear the following captions: Richard Roe v.
6 USA and John Doe, Docket No. 10-2905, and Richard Roe,
7 Petitioner v. USA, Respondent and John Doe 1, John Doe 2,
8 Defendants, Docket No. 11-479. I ask each of the persons whose
9 names I call out to simply answer my confirming his or her
10 presence.

11 This is not the time for anything more than the word
12 "present" and an indication of whether you are admitted to the
13 bar of this court. You will each have time to express your
14 views after this roll call and after I make a brief
15 introductory statement.

16 Richard Roe, also known as Frederick Oberlander.

17 MR. ROE: Present, and I am not admitted in this
18 court.

19 JUDGE CABRANES: We usually stand.

20 MR. ROE: I'm sorry.

21 JUDGE CABRANES: Are you admitted to any federal
22 court?

23 MR. ROE: Southern District.

24 JUDGE CABRANES: Counsel for Richard Roe is Richard
25 Lerner.

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1 MR. LERNER: Yes. I am present and admitted to
2 practice before this court.

3 JUDGE CABRANES: Thomas W. Hyland.

4 MR. LERNER: He was unable to make it here today.

5 JUDGE CABRANES: Unable to make it today. Judy
6 Selmecic.

7 MS. SELMECI: I am admitted to practice in this Court.

8 JUDGE CABRANES: You are admitted to the bar of this
9 court. Thank you.

10 Counsel for the United States, Todd Kaminsky.

11 MR. KAMINSKY: Present, your Honor, and admitted.

12 JUDGE CABRANES: Elizabeth Kramer.

13 MS. KRAMER: Present, your Honor, and admitted.

14 JUDGE CABRANES: Marshall Miller.

15 MR. MILLER: Present your Honor add admitted.

16 JUDGE CABRANES: Peter Norling.

17 MR. NORLING: Present and admitted.

18 JUDGE CABRANES: Counsel for John Doe, Kelly Anne
19 Moore of Morgan Lewis & Bockius.

20 MS. MOORE: Present and admitted your Honor.

21 THE COURT: David Snyder of Morgan Lewis & Bockius?

22 MR. SNYDER: Present, your Honor, and not admitted.

23 JUDGE CABRANES: Are you admitted to any federal bar?

24 MR. SNYDER: No, your Honor.

25 JUDGE CABRANES: You are admitted to what bar?

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1 MR. SNYDER: State of New York.

2 JUDGE CABRANES: Nader Mobargha of Beys Stein &
3 Mobargha.

4 MR. MOBARGHA: Present and not admitted to this Court.

5 JUDGE CABRANES: To what court are you admitted?

6 MR. MOBARGHA: The Southern and Eastern Districts of
7 New York.

8 JUDGE CABRANES: And the State of New York?

9 MR. MOBARGHA: Yes.

10 JUDGE CABRANES: Is there anyone else whose name I
11 have not called?

12 MR. BEYS: Yes, your Honor. Michael Beys of Beys,
13 Stein & Mobargha for defendant-appellee Doe, present and
14 admitted.

15 JUDGE CABRANES: Thank you.

16 We are here for oral argument in two related matters.
17 As I indicated, they bear captions that at least temporarily
18 employ the coined names of "John Doe" and "Richard Roe" -- the
19 cases that, as I noted, are docketed in the Court of Appeals as
20 No. 10-2905-cr. and No. 11-479-cr. Both arrived from
21 long-lived proceedings in the United States District Court for
22 the Eastern District of New York before Judge I. Leo Glasser.
23 The record will reflect that, pursuant to an order of the
24 Court, we are here in a closed courtroom. The proceedings here
25 are being recorded by an official court reporter as well as by

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1 electronic means. The record in these cases shall remain under
2 seal until further order of the Court.

3 These matters came before this Court on an expedited
4 and emergency basis. In documents placed before us, the
5 government and the district court asserted serious concerns
6 about the public dissemination of certain documents, in and out
7 of state and federal court proceedings. These disclosures
8 allegedly are in violation of court orders and allegedly could
9 risk life-threatening injury to identifiable persons, including
10 the person identified in our cases as John Doe.

11 As a result of the way in which these emergency
12 matters were presented to the Court, and in order to try to
13 maintain the status quo in volatile and confused circumstances
14 until this expedited hearing could be held, this Court has
15 entered a series of temporary sealing orders and/or injunctive
16 orders.

17 Because these orders were entered in response to
18 fast-breaking developments, the captions and references to
19 petitioner and respondent are sometimes the victim of
20 typographical errors. The captions will be adjusted in the
21 course of this hearing or immediately thereafter. Suffice it
22 to say for now that, regardless of any obvious typographical
23 errors in the orders, we are all well aware that the sealing
24 orders and temporary injunctions of the Court of Appeals have
25 all been aimed at Richard Roe, an attorney at law, and at his

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1 attorneys. It is not John Doe or the government who have
2 sought to disseminate any of the material at issue here. The
3 only parties who have indicated on the record an intention to
4 disseminate the documents at issue here are Richard Roe and his
5 attorneys. That much the court knows and that much all of you
6 here know.

7 Accordingly, to avoid caption issues that may cause
8 confusion on the record, let us speak today of Richard Roe and
9 John Doe, not of petitioner or respondent, nor of appellant and
10 appellees. It is clear from the record, of course, that it is
11 Richard Roe and his lawyers who vigorously and openly wish to
12 disseminate these materials, and thus it is the government and
13 John Doe who wish to prevent Roe and his lawyers from doing so.

14 The first Court of Appeals order of consequence was an
15 order of Judge Livingston sealing the record of this case and
16 referring the emergency motions of the government to a
17 regularly-convened motions panel.

18 We are that panel.

19 After this matter was referred to this motions panel,
20 the Court entered a number of orders that re-affirmed the
21 sealing order of Judge Livingston and otherwise sought to
22 maintain the status quo until this hearing could be held.

23 We have taken precautions to assure that all counsel
24 of record and the party known as Richard Roe receive timely
25 notice of these orders promptly upon entry of the order by

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1 e-mail and/or fax and/or phone calls from the clerk's office.
2 Unless informed otherwise, we will assume that notice of these
3 several orders was effected.

4 You may wish to take notes of the Court orders to
5 which I refer. In order to assist you in this regard, the
6 Court asked the Deputy Clerk of Court to provide each of you
7 with copies of these orders before we convened here. I am
8 informed that sets of these copies were provided to all counsel
9 of record and that each of you has copies of these orders
10 before you at this time.

11 They include:

12 (1) An order of February 8, 2011 granting the
13 government's motion to temporarily seal the docket here and
14 seeking to prevent any public dissemination of matters subject
15 to existing sealing orders;

16 (2) An order of February 9, 2011 denying a motion to,
17 among other things, vacate the court's earlier so-called sua
18 sponte order closing the courtroom for today's hearing;

19 (3) An order of February 10, 2011 that, among other
20 things, consolidated these two docketed appeals until further
21 order of the Court. It also responded to reports or apparent
22 threats by Richard Roe and/or his counsel to disseminate sealed
23 materials at issue here in other court proceedings or public
24 forums. The Court responded to these reports or apparent
25 threats in the order of February 10 by, among other things,

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1 temporarily enjoining "all parties . . . from disseminating or
2 distributing in any manner and in any court, proceeding, or
3 forum any documents filed in th[ese appeals] or in related
4 proceedings in the Eastern and Southern Districts of New York
5 or the contents thereof, to any member of the public or media
6 except to those persons directly involved in the parties' legal
7 representation, who shall be bound by this order of
8 confidentiality and sealing."

9 The February 10, 2011 order also affirmatively
10 enjoined Richard Roe, who is a member of the bar, to submit in
11 writing by 5 p.m. on Friday, February 11, "a list of any public
12 or media persons . . . to whom he or his counsel have revealed
13 or distributed in any manner the filings in these proceedings
14 or the contents thereof."

15 This February 10 order also affirmatively enjoined
16 Richard Roe to identify with specificity the documents or
17 contents that were revealed or distributed to each such person.
18 This, too, was to have been done by Friday, February 11 at 5:00
19 p.m.

20 I understand that we have a letter that was indeed
21 filed on Friday but that has come to our attention only this
22 morning and which apparently was not conveyed to opposing
23 counsel. We will deal with that matter in a moment.

24 I think we all know what "under seal" means -- but
25 perhaps not, so I wish to make it clear that for the time being

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1 and until this Court is able to sort out the claims of a breach
2 of court sealing orders, these proceedings are confidential and
3 the record is subject to a sealing order of this Court, the
4 violation of which will subject any violator of our sealing
5 orders to punishment for civil and/or criminal contempt of
6 court.

7 It should likewise be clear that the parties hereto
8 are always free to seek review of our orders from the Supreme
9 Court of the United States. That said, while our sealing
10 orders remain in effect, as they may be supplemented by
11 additional orders today or in the near future, any and all
12 papers filed in the Supreme Court referring to matters or
13 documents subject to extant sealing orders shall be filed in
14 the Supreme Court under seal.

15 I have also been informed today that there is a copy
16 of a purported petition for certiorari that was filed or was to
17 be filed in the Supreme Court. Apparently, it was not filed
18 under seal. We will expect that counsel of record will take
19 all the necessary precautions to seek to place that material
20 under seal until further order of this Court or of the Supreme
21 Court.

22 These preliminary matters having been completed, I
23 will ask the representative of the U.S. Attorney's Office for
24 the Eastern District of New York to come forward and provide a
25 general status report on the proceedings to date and to provide

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1 a brief statement of what relief, if any, the government seeks
2 today.

3 We will then hear from counsel for Richard Roe, from
4 whom we likewise will seek a statement of the relief he seeks
5 from this Court.

6 MR. KAMINSKY: Good afternoon. May it please the
7 Court, I'm Todd Kaminsky. And I represent the appellee, the
8 United States. And the government is here today to argue for a
9 continued sealing of the appellate docket and now what is the
10 consolidated dockets before this court.

11 The government, as laid out in its brief, believes
12 that an unsealing of the docket at this time and a public
13 filing and release of the documents that opposing counsel would
14 like to, and Roe and his attorney would like to release at this
15 time pose a substantial probability of prejudice to Doe's
16 safety in this case.

17 JUDGE CABRANES: Could you tell us whether at the
18 moment all the documents in Doe's criminal proceeding and in
19 the Southern District of New York civil matter, are they all
20 now under seal as far as you know?

21 MR. KAMINSKY: The Southern District, your Honor, they
22 are not all under seal. Although I am not a party to that
23 civil proceeding, I've gone on to the electronic PACER system
24 and several documents can be accessed. The main document at
25 issue in that case, the complaint filed by Mr. Roe that

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1 contains all of the damaging information about Mr. Doe, that
2 cannot be accessed publicly at this time.

3 The Eastern District docket, currently being presided
4 over by the Honorable Judge Glasser, is completely under seal.
5 There are no accessible documents at this time.

6 JUDGE CABRANES: Can you describe in general terms why
7 these documents are so sensitive, particularly since some of
8 them seem to be somewhat antique, and there have been in the
9 past some news accounts of the activities or purported
10 activities of John Doe?

11 MR. KAMINSKY: Yes, your Honor.

12 Mr. Doe's cooperation was of an extraordinary depth
13 and breadth, almost unseen, at least in this United States
14 Attorney's Office.

15 He cooperated, unlike some cooperators who cooperate
16 within one type of organized crime family or over one type of
17 crime, Mr. Doe's cooperation runs a gamut that is seldom seen.
18 It involves violent organizations such as Al Qaeda, it involves
19 foreign governments, it involves Russian organized crime. And,
20 most particularly, it involves various families of La Cosa
21 Nostra. By that specifically I mean an individual on the
22 ruling board of the Genovese crime family, a captain in the
23 Bonanno crime family, a soldier in the Gambino crime family,
24 the list goes on and on.

25 The reason why I bring that up, your Honor, is that

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1 all of the documents that are currently within the 1998 docket
2 in front of Judge Glasser mention Mr. Doe's name or refer to
3 his cooperation.

4 Now, at the time of the sealing in 1998 and through
5 the beginning of 2008, Mr. Doe worked in a proactive capacity
6 actively aiding grand jury investigations that involved
7 surreptitious recordings of individuals as well as other
8 undercover actions.

9 JUDGE POOLER: Counsel, are you satisfied that he's
10 told the truth in all cases?

11 MR. KAMINSKY: Your Honor, from the record that I have
12 seen, and it was my job for his sentencing to review all of his
13 statements to the FBI, I was not the individual that worked
14 with him, but I have no information that he has been untruthful
15 for any purpose or to any extent.

16 JUDGE POOLER: You are relying on his information in
17 other cases?

18 MR. KAMINSKY: Yes.

19 There are no current prosecutions that involve the
20 necessary testimony or information from Doe at this time. But
21 there got to be a situation where ten years of constant
22 undercover work and arrests and indictments as well as
23 convictions, some very extensive, made as a result of his
24 actions got to a point where it became too dangerous to allow a
25 confirmation of his cooperation to be known.

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1 There have been public accounts. They have been
2 extensive in terms of their allegations, but they have been
3 lacking in terms of their corroboration and the government seal
4 of approval, if you will. The government feels that is an
5 important difference.

6 JUDGE CABRANES: At this particular proceeding I take
7 it that the government is seeking a temporary injunction, that
8 is, for the time being, during the pendency of the appeal,
9 which presumably would sort out all of these issues.

10 MR. KAMINSKY: That's correct. The government
11 certainly envisions a time when part of this docket will be
12 unsealed, and I note to the Court that the actual filing
13 occurred in May, meaning the Southern District complaint that
14 started this whole incident. But only on February 3 and 4 did
15 Mr. Roe or counsel for Mr. Roe finally make a motion, it was
16 actually a demand below to unseal the docket. And I do not
17 know what procedures the district court intends to employ. As
18 U.S. v. Doe from 1995 states, there are numerous ways for a
19 district court to go about determining --

20 JUDGE CABRANES: How many cases are there, as far as
21 you know, in the Southern District of New York that are
22 arguably related to these matters?

23 MR. KAMINSKY: Only one, your Honor.

24 JUDGE CABRANES: Only one?

25 MR. KAMINSKY: Yes.

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1 JUDGE CABRANES: This is the one before Judge
2 Buchwald?

3 MR. KAMINSKY: Correct.

4 JUDGE CHIN: Judge Buchwald never sealed that case,
5 right? She just sealed the complaint as opposed to the entire
6 case?

7 MR. KAMINSKY: That's correct. Your Honor, I stand
8 corrected. I have not been involved in the civil matters. I
9 turned to Mr. Doe's counsel. I have been informed the answer
10 is three, three related matters.

11 JUDGE POOLER: Counsel, I read an article in the New
12 York Times that seems to have vital information about John Doe.
13 How can you keep it secret when it's been in the New York
14 Times?

15 MR. KAMINSKY: Your Honor, there are a number of
16 things, a number of responses to that.

17 JUDGE POOLER: That was submitted to me I didn't go
18 searching for it. It was submitted with one filing. I guess
19 must be from Richard Roe.

20 MR. KAMINSKY: The government alerted the Court to
21 that.

22 JUDGE POOLER: OK.

23 MR. KAMINSKY: In that filing, your Honor, there were
24 three individuals who pleaded guilty together as part of the
25 underlying crime who became cooperators together and then who

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1 worked for the government. One of those cooperators became
2 disgruntled, spoke to the New York Times and said, I was there
3 I saw it happen. But the Times itself couldn't find any
4 confirmation of that.

5 It may be that during a future determination of how
6 much could be unsealed that article will play a role. But the
7 government feels that opposing counsel's actions in this case
8 of unilaterally deciding to out the cooperator within the
9 context of a current litigation is just not an acceptable way
10 of doing that.

11 However, your Honor, the government also feels that it
12 is a world of difference between the Times speculating about
13 something and it being enough of a government stamp of approval
14 to warrant retaliatory action against somebody. The government
15 feels at this time that the threats are still extensive enough
16 that even with that article it would be extremely dangerous to
17 have Mr. Doe's cooperation revealed.

18 JUDGE CABRANES: To the extent that we may be
19 restraining dissemination of these materials to the press or to
20 other media, I have a number of questions for you. These
21 questions will be a little specific. They might seem a bit
22 redundant, but I want to make sure that we have everything set
23 forth very clearly on this record.

24 And now I'm turning to the famous question of prior
25 restraint. One way of evaluating a prior restraint is to

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1 examine the gravity of the evil discounted by the impossibility
2 that it will occur.

3 What exactly is the danger you fear here if the
4 information in these documents becomes public?

5 MR. KAMINSKY: Your Honor, it's twofold: I'll start
6 with the, if you will, less grave one first.

7 As this Court stated in Amedeo II, the knowledge that
8 someone who is a cooperator and has gone to the extent that
9 Mr. Doe has will be an outed individual who will have to live
10 his or her life in fear I think is something that will dissuade
11 such cooperation in the future. As that Court said, if such
12 informants in the present or future cases anticipate that their
13 cooperation will likely become a matter of public knowledge,
14 valuable cooperation might cease.

15 Second of all, I think it's a very real harm that
16 could come to Mr. Doe himself. The very families that Mr. Doe
17 cooperated against have killed witnesses in the past. That's
18 been recorded. And his cooperation --

19 JUDGE CABRANES: You are speaking of organized crime
20 families?

21 MR. KAMINSKY: That's correct. And his cooperation
22 was not just the type of cooperation not to be noticed. It
23 shut down an enterprise that shut off the valve to tens of
24 millions of dollars.

25 JUDGE POOLER: Do they know who the cooperator is?

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1 MR. KAMINSKY: Your Honor, there are a number of
2 different individuals whom they may suspect. But Mr. Doe was,
3 depending how one looks at it, fortunate to not have to testify
4 over his 11-year career as a cooperator and none of the
5 individuals in organized crime had ever received any, as far as
6 the government knows, any official acknowledgement of that
7 cooperation.

8 JUDGE POOLER: Has he been sentenced for his
9 conviction?

10 MR. KAMINSKY: Yes.

11 JUDGE CABRANES: So I take it that in your experience
12 you are telling us that the danger here can be characterized as
13 great and certain?

14 MR. KAMINSKY: Your Honor, the government certainly
15 affirms the word "great." "Certain" is something the
16 government is a little bit less comfortable with. I'm
17 comfortable with the words in Doe of a substantial probability.
18 I believe that probability is substantial.

19 JUDGE CABRANES: So, if I understand you correctly,
20 you're saying that the critical government interest here is
21 protecting the life of the cooperating witness, among other
22 things?

23 MR. KAMINSKY: Yes, your Honor.

24 JUDGE CABRANES: Are there any less intrusive measures
25 other than sealing that would be adequate to prevent the danger

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1 we are talking about?

2 MR. KAMINSKY: The government thinks not, your Honor.

3 The extent of what sealing would be left on this
4 record is still something that is to be worked out. But the
5 government advocates for a sealing that does not release the
6 real name of Mr. Doe and does not reveal facts that would alert
7 other individuals to his cooperation or conviction.

8 JUDGE CABRANES: Is it the case that various orders
9 entered by the district court and the Court of Appeals involve
10 no prior restraints on the press or media?

11 MR. KAMINSKY: That's correct.

12 JUDGE CABRANES: That is, we are not talking about
13 preventing a news organization from publishing a matter of
14 public concern or impinging on editorial discretion.

15 MR. KAMINSKY: No, your Honor, and the government
16 feels that's particularly salient in this case. The Supreme
17 Court in Gentile v. State of Nevada has laid out a clear
18 distinction between attorney speech, especially that in the
19 context of ongoing litigation, meaning not an attorney as a
20 private citizen but as an attorney acting as a hired legal
21 representative and that of the press. It is regulated by an
22 entirely different standard, and the Supreme Court has said
23 that an attorney's First Amendment rights do not give him a
24 blanket opportunity to commit what are clearly unethical acts.

25 JUDGE POOLER: Indeed, as we discussed a moment ago,

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1 this has been published information about this case has been
2 published.

3 MR. KAMINSKY: That's correct, your Honor.

4 JUDGE CABRANES: Let me understand something about the
5 proceedings before Judge Glasser.

6 Do I understand correctly that Judge Glasser only
7 issued a permanent injunction with respect to the presentence
8 report?

9 MR. KAMINSKY: Correct.

10 JUDGE CABRANES: And the cooperation agreement, the
11 proffer agreement, and the sealed indictment, what's their
12 status, and do they remain in the possession of Richard Roe?

13 MR. KAMINSKY: They remain in the possession of
14 Richard Roe. I believe the copies of these documents remain in
15 the possession of Mr. Roe and other individuals to whom he
16 originally sent them when he filed the complaint.

17 But Judge Glasser has currently not reviewed them, has
18 not resolved that issue. It was clear to Judge Glasser that
19 the PSR, according to Charmer was a clear issue of law where
20 the document had to be returned by Mr. Roe, but he asked for
21 briefing on what powers he had to ask for documents to be
22 returned that were taken.

23 The issue there was, your Honor, who did the original
24 sealing order apply to, and if Mr. Roe was not a party to that
25 original proceeding did Judge Glasser have the authority to

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1 enjoin him. The government has written on that matter and has
2 briefed the issue that, according to the all writs act, Judge
3 Glasser does have such power.

4 JUDGE CABRANES: And that matter is still before Judge
5 Glasser?

6 MR. KAMINSKY: That's correct.

7 I would just like to remind the Court that there was I
8 standstill agreement between Roe and Doe for about four months
9 where nothing happened at all, and then in the fall the
10 litigation resumed again. And that's when the government filed
11 a letter in furtherance of another injunction.

12 JUDGE POOLER: Does the government have a theory as to
13 how Roe got ahold of these documents?

14 MR. KAMINSKY: We do, your Honor. Judge Glasser held
15 a day of hearings where he called Roe to testify, and Mr. Roe
16 stated that it was a client of his --

17 JUDGE POOLER: Not John Doe?

18 MR. KAMINSKY: No. A client of his had given them to
19 him. Mr. Doe testified that he kept them in his office, and
20 Judge Glasser came to the conclusion at the end of the hearings
21 that a client of Mr. Roe had stolen them from Mr. Doe, from his
22 office, and had provided them to Mr. Roe. Judge Glasser said
23 on the record that it was clear that they were taken under
24 less-than-legal circumstances.

25 JUDGE POOLER: And Mr. Roe still has them? Attorney

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1 Roe still has them.

2 MR. KAMINSKY: Yes, and copies.

3 JUDGE POOLER: And copies of them?

4 MR. KAMINSKY: Yes.

5 JUDGE POOLER: Have you asked for them back?

6 MR. KAMINSKY: I don't know if we specifically have
7 spoken on a one-to-one basis with them, but we have certainly
8 made clear our position that they are not entitled to them.

9 JUDGE POOLER: You have never requested them to be
10 turned in to the U.S. Attorney's Office.

11 MR. KAMINSKY: Your Honor, Judge Glasser directed
12 Mr. Roe to return the PSR to the U.S. Attorney's Office, and
13 we've never received his copy, so we did not.

14 JUDGE CABRANES: Did that happen as far as you know?

15 MR. KAMINSKY: No, we haven't been given anything.

16 JUDGE CABRANES: You don't know of any reason to
17 believe that the presentence report was returned.

18 MR. KAMINSKY: At this time the government is positive
19 that Mr. Roe has copies of the PSR that he says that he is
20 under no obligation to return to anyone.

21 JUDGE CABRANES: But there is an order directing him
22 to return his copies of the PSR?

23 MR. KAMINSKY: Yes, and he appealed that.

24 JUDGE CABRANES: But we don't know whether he has
25 obeyed that order.

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1 MR. KAMINSKY: He has clearly not obeyed that order,
2 your Honor.

3 JUDGE CABRANES: I see. Are you aware whether any
4 authorities in the federal or state governments are
5 investigating or considering criminal prosecution of the people
6 who apparently stole these documents in the first place?

7 MR. KAMINSKY: I have. I recently been in contact or
8 received a call from assistant district attorneys in Manhattan
9 where Mr. Doe's office was. I guess that would be the
10 jurisdiction for the theft. But I am not involved in that and
11 don't know how far it's gone.

12 JUDGE CABRANES: Thank you.

13 Let's hear from -- unless my colleagues have any other
14 questions?

15 JUDGE POOLER: No.

16 JUDGE CABRANES: We'll turn to counsel for Roe.

17 MR. KAMINSKY: Thank you, your Honor.

18 MR. LERNER: Good afternoon, your Honors. I would
19 first like to correct the record. The PSR which Mr. Roe
20 received directly from the former client at the company, who I
21 shall not name, that was handed up to the Court as an exhibit
22 during the proceedings. That original is in the Court's
23 possession.

24 There was further briefing --

25 JUDGE CABRANES: In possession of Judge Glasser?

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1 MR. LERNER: Yes.

2 JUDGE CABRANES: Do you or your client continue to
3 have copies of the presentence report?

4 MR. LERNER: Yes, electronic copies.

5 Now, there's affidavits -- I don't know whether your
6 Honors have seen the affidavit from the company's general
7 counsel. He states that when he received the complaint in the
8 Southern District action from Mr. Roe, and this was before
9 there was any injunctive relief or a sealing order issued, that
10 attorney, Mr. Schwartz, disseminated it to many people.

11 JUDGE CABRANES: Who is Mr. Schwartz?

12 MR. LERNER: He was the general counsel of the company
13 who I think I am -- shall I name the company here?

14 JUDGE CABRANES: Yes, I think so.

15 MR. LERNER: Bay Rock. He was the general counsel of
16 Bay Rock. He disseminated when it was received, when that
17 complaint was received from the attorney for Bay Rock. The
18 firm was Akerman Senterfitt. Akerman Senterfitt, a Miami firm,
19 represented Bay Rock. That complaint was provided as a
20 courtesy to the Akerman Senterfitt firm with all of the
21 exhibits.

22 That e-mail was then forwarded to Bay Rock's general
23 counsel who disseminated it.

24 JUDGE CABRANES: Those exhibits of court documents
25 included the presentence report?

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1 MR. LERNER: Included the presentence report.

2 JUDGE CABRANES: Anything else? Any of these other
3 documents? Cooperation agreement?

4 MR. LERNER: The complaint, the cooperation agreement,
5 and the criminal information.

6 So what's before the Court below --

7 JUDGE CABRANES: Well, you've submitted today a letter
8 dated February 11 which I have not been able to fully digest
9 shall we say. You know the letter I'm referring to.

10 MR. LERNER: Yes, if I may summarize it, simply
11 indicating the attorneys with whom Mr. Roe has consulted with
12 regard to various issues that are connected with this.

13 JUDGE CABRANES: Does the list of persons or the
14 number of persons to whom you just referred as having received,
15 electronically or otherwise, these documents, are they listed
16 in your filing?

17 MR. LERNER: I don't think we mentioned Mr. Schwartz.

18 JUDGE CABRANES: Are you going to be able to give us
19 that information in another letter?

20 MR. LERNER: I think we can supplement that. I
21 indicated that it was to the best of our abilities at the time.

22 JUDGE CABRANES: But you think you will be able to do
23 that, to supplement it as best you can?

24 MR. LERNER: I know that I provided full information
25 as to who I personally disclosed it to.

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1 And that included --

2 JUDGE CABRANES: What about your client Richard Roe?

3 MR. LERNER: Mr. Roe, as he indicated in his
4 declaration, to the best of his knowledge he has disclosed
5 that.

6 JUDGE CABRANES: This letter to which I have just
7 referred was submitted to the Court. Was it submitted under
8 seal?

9 MR. LERNER: It was not.

10 JUDGE CABRANES: It was not. Was a copy conveyed to
11 counsel for the government?

12 MR. LERNER: No. I indicated in the letter that I am
13 providing privileged information, however, if the Court wishes
14 to disclose it --

15 JUDGE CABRANES: I am a little confused. You didn't
16 file it under seal. You didn't feel it was necessary to keep
17 it from the world. You felt it was only necessary to keep it
18 from the government. But, of course, they can go on the
19 electronic site and print it out. So you don't mind if this is
20 copied and given to the government?

21 MR. LERNER: I would not strongly object.

22 JUDGE CHIN: Was it filed electronically?

23 MR. LERNER: Actually, I did not know that it would be
24 filed in the docket. I was asked by the calendar clerk to
25 provide the letter by 5:00 p.m., and I faxed it directly to the

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1 calendar clerk.

2 JUDGE POOLER: Attached to your letter is the
3 declaration of Richard Roe using his real name?

4 MR. LERNER: Yes.

5 JUDGE POOLER: Wasn't that a violation of previous
6 orders?

7 MR. LERNER: I don't know that Roe could sign a
8 declaration in the name of Roe. I don't know. As I indicated
9 in my letter, I didn't know how to deal with that from a
10 technical perspective.

11 JUDGE CABRANES: Inasmuch as you have no objection to
12 sharing this letter of February 11 with the government, for the
13 sake of expedition, I am going to give my copy to the clerk to
14 pass it to the government, since we can get our own copy off
15 the computer.

16 MR. LERNER: I would like to correct another statement
17 that was made earlier, and then I would like to proceed with
18 the argument.

19 The Court directly asked the government whether any of
20 these documents are out in the public domain. The answer, and
21 now that I can, I think I can fairly -- well, may I state a
22 publication on the record as to where -- OK. Business Week
23 published an article in 1998. That article is called, The Case
24 of the Gym Bag that Squealed. That article indicates that
25 Business Week has a copy of the complaint. That article is

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1 still up on the website.

2 I submit that if Business Week has the right, as they
3 obviously do, to disseminate that complaint and to discuss that
4 complaint, so too --

5 JUDGE CHIN: Did you say 1998?

6 MR. LERNER: Yes. And that article is still up.

7 JUDGE CHIN: And the complaint, which complaint are
8 you talking about?

9 MR. LERNER: The complaint in the Eastern District
10 action.

11 JUDGE CHIN: In the criminal case, OK.

12 MR. LERNER: The Eastern District action, the criminal
13 case, yes. That article, which remains on the website,
14 indicates that Business Week has a copy of the criminal
15 complaint, which means that they got it from the government or
16 they got it from the FBI. OK. So it is not --

17 JUDGE POOLER: Why does it naturally follow that they
18 got it from the government or the FBI?

19 MR. LERNER: Well, one would presume that Mr. Doe did
20 not give it to Business Week.

21 JUDGE POOLER: And Mr. Roe was not involved at that
22 point?

23 MR. LERNER: No. Mr. Roe wasn't involved in anything
24 related to Bay Rock until I believe he was retained to
25 represent the aforementioned person or assist in prepping an

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1 individual for a deposition.

2 JUDGE POOLER: When was that? When did he come in
3 contact with the facts of this case?

4 MR. LERNER: Well, he's been involved with the facts
5 of the Bay Rock matter for about two years. He's been
6 preparing a RICO complaint. It was only in March of 2010 that
7 the employee at Bay Rock who Mr. Roe was assisting to prepare
8 for a deposition said, I know you are working on this case,
9 these documents might be of use to you.

10 JUDGE CABRANES: Can you set forth precisely how your
11 client obtained the sealed presentence report, the cooperation
12 agreement, and the other documents from those criminal cases?

13 MR. LERNER: Yes. There was testimony on the record
14 that Mr. Row obtained them from that individual who he was
15 assisting to prep for a deposition.

16 We supplemented that with e-mails that we submitted to
17 the judge below. That indicated that these documents were
18 maintained on the Bay Rock company's website -- I'm sorry,
19 internal computer system.

20 Mr. Doe had directed that witness who I'm referring
21 to, the deponent, as part of his job --

22 JUDGE CABRANES: Who was that witness?

23 MR. LERNER: May I state his name?

24 JUDGE CABRANES: Yes.

25 MR. LERNER: Bernstein, Joshua Bernstein.

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1 -- had instructed Joshua Bernstein to keep backup
2 copies of all documents, all important documents.

3 So, these documents were on the Bay Rock server. Now,
4 Mr. Doe testified below that he wasn't a partner in the
5 company. He was a mere employee. There's nothing in the
6 record to indicate that he had an expectation of privacy as to
7 e-mails, e-mail documents maintained on the company server.
8 But these documents were -- downloading these documents and
9 archiving them and reviewing them was part of Mr. Bernstein's
10 job.

11 JUDGE POOLER: Is that a public website or --

12 MR. LERNER: No, it is a private internal company
13 website.

14 JUDGE POOLER: Right.

15 MR. LERNER: So it was obtained lawfully. And I will
16 not point out that under the Pentagon papers case it is
17 irrelevant whether the documents were obtained lawfully or
18 unlawfully. They may be used and published as --

19 JUDGE POOLER: The PSR's have their own sealing
20 regimen that does not relate to any order of the court.

21 JUDGE CABRANES: We are not dealing here with prior
22 restraint of the press or the media. That's what the Pentagon
23 papers case was about.

24 MR. LERNER: Well, your Honors, I would respectfully
25 submit that petitioning the government for redress of

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1 grievances by filing a complaint in an action --

2 JUDGE CHIN: Do you acknowledge, right or wrong,
3 whether the sealing order was correctly issued or not correctly
4 issued, do you acknowledge that your client has to comply,
5 subject to his right to appeal?

6 MR. LERNER: Your Honor, I am not certain which
7 sealing order you're referring to.

8 JUDGE CHIN: Any order. If there is an order in place
9 prohibiting him from disclosing certain things, do you
10 acknowledge that he must comply with that order subject to his
11 ability to appeal and get relief from a higher court?

12 MR. LERNER: May I read directly from the transcript
13 below with respect to that issue?

14 JUDGE CHIN: I would like it if you would answer my
15 question.

16 MR. LERNER: The answer to the question was answered
17 on the record by Mr. Roe. He said, My understanding is that a
18 sealing order is directed to court personnel and it is not an
19 in personam -- it is not an order against other individuals.

20 JUDGE CABRANES: Judge Chin directed his question to
21 you.

22 MR. LERNER: My answer is no, a sealing order is
23 directed to court personnel. It is not directed to
24 individuals. A sealing order may be accompanied by an
25 injunctive order prohibiting speech.

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1 JUDGE CHIN: What is the point of a sealing order if a
2 party could freely disseminate the document? It would
3 completely undermine the point of the sealing order.

4 MR. LERNER: Judge Glasser stated on the record that
5 there is no sealing order in the case, so he could not have
6 violated a sealing order. Moreover, in the testimony, Mr. Roe
7 stated, My understanding is that a sealing order is not an
8 injunction, and he cited in his testimony a case called Roman
9 Catholic Diocese, a Kentucky case, the Supreme Court. And
10 Judge Glasser stated, Your understanding is correct.

11 JUDGE CABRANES: When Roe obtained these documents,
12 were any of them marked in any way that suggested that they
13 were under seal?

14 MR. LERNER: Not the criminal information, not the
15 complaint, not the cooperation agreement. There were markings
16 on the PSR. I don't recall the exact language of the PSR, but
17 it is not a 65(d) injunction, which must be directed to
18 specific individuals. It must state the basis for the
19 injunction. It is not a court order directed to
20 Mr. Oberland -- Mr. Roe.

21 JUDGE CABRANES: You can refer to him by name here.
22 It's all right. We are all under seal here. But, of course,
23 you may not believe in sealing orders. But you can feel free
24 to refer to anyone here by the correct name or the code name,
25 as you wish.

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1 MR. LERNER: Well, the PSR doesn't have injunctive
2 language in accordance with Rule 65(d). Therefore, it is not
3 subject to -- it is not an injunction. It could not bar the
4 dissemination by Mr. Roe.

5 JUDGE CABRANES: Take 60 seconds and wrap up your
6 argument.

7 MR. LERNER: Your Honors, we are here before the Court
8 on a motion to seal the docket. There has been no record
9 finding in support of the sealing of the docket. There's no
10 evidence that has been submitted, there's argument, but no
11 evidence to support the sealing of the docket. And in order to
12 seal a docket, there must be on-the-record findings
13 demonstrating its propriety. I would also like to state --

14 JUDGE POOLER: Don't we have an admission from Mr. Roe
15 that he has these documents? Isn't that per se evidence?
16 Isn't that enough?

17 MR. LERNER: To seal the appellate docket?

18 JUDGE POOLER: Yes. He has records that the judges
19 thought were under seal already. He has them and admitted he
20 has them.

21 MR. LERNER: Yes, he has them.

22 JUDGE POOLER: Why isn't that enough evidence to seal
23 the record until further order of this court?

24 MR. LERNER: Because in Hartford Courant this court
25 said it is inappropriate to seal an entire court docket.

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1 JUDGE POOLER: But that is also a newspaper case.

2 MR. LERNER: I would submit, your Honors, that under
3 Citizens United all individuals have the same First Amendment
4 rights. The Supreme Court stated it expressly. We no longer
5 distinguish between newspapers and individuals.

6 JUDGE POOLER: But newspapers have a special charge in
7 publishing information for citizens. Mr. Roe doesn't have any
8 charge in making this information available to citizens.

9 MR. LERNER: Mr. Roe has the charge to represent his
10 clients, who have the charge to represent, as they are acting
11 in a fiduciary role, they represent they are acting
12 derivatively and representing many investors. So he has a
13 First Amendment right to use and publish these documents as he
14 will.

15 Now I will state very directly, your Honor, the fact
16 that this is not out in the public proves Mr. Roe's good faith.
17 He has never circulated this publicly. He asserts his absolute
18 right to do so, but he has not done so.

19 We ask that the Court abide by U.S. Supreme Court
20 precedent, and if it is to hold that this proceeding is to be
21 closed, that the docket is to be closed, that record findings
22 be made on evidence, and there is no evidence here to support
23 the burden of proof that is on the government.

24 JUDGE CABRANES: Let me ask you directly, you have
25 filed a petition for certiorari with the Supreme Court?

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1 MR. LERNER: We have filed a petition to stay this
2 proceeding. Every name that could give anyone notice as to
3 what is going on here was redacted. I provided that to this
4 Court in advance before filing it. I provided it to counsel in
5 advance before filing it.

6 JUDGE POOLER: Did you file it at noon as you said you
7 were going to do?

8 MR. LERNER: It was filed precisely at noon.

9 JUDGE CABRANES: Today?

10 MR. LERNER: No, it was filed at noon on Friday.

11 JUDGE CABRANES: Noon on Friday.

12 MR. LERNER: It was denied.

13 JUDGE CABRANES: It was denied already?

14 MR. LERNER: Yes.

15 JUDGE CABRANES: So there's nothing pending before the
16 Supreme Court at this point?

17 MR. LERNER: That is correct.

18 JUDGE CABRANES: Lest there be any confusion, we think
19 that you should make whatever arrangements are appropriate with
20 the Clerk of the Supreme Court to make sure that this
21 now-defunct proceeding remains under seal for the time being.
22 That is for you to apply, and you can indicate to them on
23 notice to the government that you are doing so at the request
24 of the Court.

25 In any event, any further appeals to the Supreme Court

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1 should be, unless you hear otherwise from this Court, properly
2 denominated as under seal. Is that understood?

3 MR. LERNER: Yes, absolutely, your Honor.

4 JUDGE CABRANES: It is so ordered.

5 JUDGE CHIN: Is it understood that it applies not just
6 to Court personnel but to anyone with notice of it, including
7 your client, without prejudice to your position, but otherwise
8 we are going to be right back to square one.

9 MR. LERNER: I think we will understand it to mean
10 that any petition will not be widely disseminated. It will go
11 from my hands --

12 JUDGE CABRANES: Will not be disseminated, period.

13 MR. LERNER: Will not be disseminated, period. It
14 will be in my hands, Mr. Roe's hands, counsel's hands.

15 JUDGE CABRANES: We will recess, and we may have
16 something for you. We would like you to stand by, and we are
17 going to consult with the Clerk of Court and others and we hope
18 to have something for you promptly.

19 Thank you.

20 (Recess)

21 JUDGE CABRANES: It is 2:53 p.m. I have asked the
22 clerk to enter an order that was entered formally at 2:45 p.m.,
23 copies of which are being delivered at this very moment to
24 those counsel who are present.

25 We will take a moment or two to review the order.

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1 Page 2 of course is a description of past proceedings.

2 Page 3 deals with the petition information, the writ
3 of mandamus, which you will note has been denied, and the
4 docket in that proceeding and all documents referenced therein
5 shall remain sealed until further order of the Court.

6 On page 4 we turn to the request by the government for
7 injunctive relief. There will be a remand to the district
8 court for the limited purpose of enforcing this Court's orders
9 and the related district court orders while the appeal goes
10 forward on the merits. And the appeal will be expedited.

11 There is a briefing schedule on page 5. This is a
12 remand under U.S. v. Jacobson. This panel shall retain
13 jurisdiction over the pending appeal both for the disposition
14 of the appeal on the merits as well as with respect to any
15 further motions practice.

16 Any other appeals from the district court's order
17 granting the permanent and temporary injunctions at issue and
18 any appeals arising from any further proceedings in the
19 district court, including any further petitions for
20 extraordinary writs, including the writ of mandamus. It is so
21 ordered.

22 Is there anything else anyone wishes to.

23 Why don't you come to the microphone so we can have
24 the benefit of your comments?

25 MR. LERNER: The matter in the Southern District is

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1 presently stayed with an order to Mr. Roe to file a
2 supplemental complaint upon the completion of the proceedings
3 before Judge Glasser.

4 We understand that he's been enjoined from making any
5 further applications. However, he would like to submit
6 application to Judge Buchwald to request further --

7 JUDGE CABRANES: He has not been enjoined from making
8 any further applications. You have misread this order. He has
9 been enjoined from making any dissemination of any of these
10 documents.

11 You can appear before Judge Buchwald at any time you
12 think appropriate, and the only condition that I would place on
13 that would be that you should, in making any presentation to
14 Judge Buchwald, attach to any filing a copy of this order.

15 MR. LERNER: Thank you, your Honor.

16 JUDGE CABRANES: It is so ordered.

17 Yes? Any further applications or comments?

18 MS. MOORE: Your Honor, my name is Kelly Moore. I'm
19 with the firm of Morgan Lewis & Bockius. We have been
20 representing Mr. Doe for sometime now. Unfortunately our legal
21 fees have gone through the roof on this matter, and a couple of
22 months ago he retained a former colleague of mine, Mr. Beys, to
23 represent him in connection with the Southern District.

24 JUDGE CABRANES: That's fine.

25 Let me just say I handled your application as a

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1 one-judge application, but frankly, not knowing what was going
2 on at the time that your application arrived, I denied it
3 without prejudice. I gather that you are now renewing your
4 application to withdraw and to be substituted?

5 MS. MOORE: Yes, your Honor.

6 JUDGE CABRANES: The application is granted.

7 MS. MOORE: Thank you.

8 MR. BEYS: Thank you.

9 JUDGE CABRANES: Anything else?

10 Does the government need any comment or application?

11 MR. KAMINSKY: Very briefly, your Honor.

12 The government during the brief recess had an
13 opportunity to first look at opposition's letter in terms of
14 which further counsel they've spoken to and submitted the filed
15 documents. The government is very concerned generally, but
16 particularly concerned about one specific attorney who
17 represents a large amount of individuals accused of being part
18 of organized crime families.

19 JUDGE CABRANES: I don't mean to minimize the
20 importance of what you are saying, but I think my colleagues
21 will agree that your concerns should now be addressed to the
22 district court. I think you will wish to contact Chief Judge
23 Dearie to determine who exactly is going to handle the
24 implementation of the court's mandate. And that judge can hear
25 any concern or application by you with respect to that.

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1 On the other hand, you may wish to complete the record
2 before our Court and state whatever you think appropriate. You
3 may wish to include some of that in the briefing on the merits,
4 but I think if you're asking for relief or you want to apply
5 for relief in that regard, you should take it up in the Eastern
6 District of New York.

7 Is that agreeable?

8 MR. KAMINSKY: Absolutely, your Honor. There was just
9 more of a technical question of whether today's sealed
10 proceeding would bar the government from speaking with one of
11 those attorneys and asking for the documents back.

12 JUDGE CABRANES: No.

13 MR. KAMINSKY: Thank you.

14 JUDGE POOLER: Counsel, before you sit down, this
15 matter before us was triggered by your motion for a temporary
16 stay of the unsealing.

17 MR. KAMINSKY: Yes.

18 JUDGE POOLER: Do you have reason to believe that the
19 documents were about to be unsealed?

20 MR. KAMINSKY: Yes.

21 JUDGE POOLER: What is the basis for that?

22 MR. KAMINSKY: We spoke to the Clerk of the Court here
23 and we were informed that, unless someone makes a motion, it's
24 going to be unsealed. It was sealed as a matter of course when
25 the appeal was filed.

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1 JUDGE POOLER: That is, the appeal in this Court?

2 MR. KAMINSKY: Yes. Correct. That was sealed pro
3 forma, and when we called to inquire about it they said not for
4 long, so we made this motion.

5 JUDGE POOLER: Thank you. Thank you for clearing that
6 up.

7 JUDGE CABRANES: Thanks very much. We are in recess.

8 (Adjourned)

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